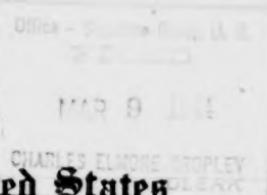


(3D)

Supreme Court of the United States



OCTOBER TERM, 1943.

No. 773

MRS. LORENA MARBRY, PETITIONER,
VS.

GEORGE W. CAIN, AND GARNISHEE, AMERICAN
CENTRAL INSURANCE COMPANY,
RESPONDENTS.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE, AND
BRIEF IN SUPPORT THEREOF.**

WILLIAM G. CAVETT,
Memphis, Tennessee,
Attorney for Petitioner.



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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

PETITION.

Petitioner prays this Court to review on writ of certiorari a judgment of the Supreme Court of Tennessee, in the case there entitled *Mrs. Lorena Marbry v. George W. Cain et al.*

A final judgment of the Supreme Court of Tennessee was rendered on February 5, 1944, when a petition for a

rehearing was denied (R. 38). The opinion of the Supreme Court was written and appears in 176 S. W. 2d, p. 813, 180 Tenn. . . . On August 10, 1940, Mrs. Lorena Marbry instituted a suit against defendant, George W. Cain, for compensatory and *punitive* damages in the sum of \$10,000. The declaration charged negligence, recklessness and a wilful tort. There was no defense made to the declaration, and on April 18, 1941, in Book 92, page 27, judgment by default against George W. Cain was entered by the Court in accordance with the Statutory laws of Tennessee since 1794, Section 8404 which says:

"If the defendant fails to appear and defend at the time prescribed by law judgment by default may be taken against him."

A writ of inquiry to assess the damages was issued according to the State laws of Tennessee and the jury's verdict on September 15, 1941, fixed the damages at \$3,500 and judgment was pronounced by the Court (R. 11). A number of executions were issued against the defendant but nothing realized on same, and finally on May 19, 1942, George W. Cain filed a petition in the United States Bankrupt Court at Memphis scheduling and listing this judgment and he was duly adjudicated a bankrupt and finally received his discharge in bankrupt court in the Federal Court, and Cain was relieved from all of his debts save and except those provided by the Federal Statute, Section 17, and the discharge expressly and mandatorily excepted.

"Except such debts as are by said act excepted from the operation of a discharge in bankruptcy."

In, 1943, George W. Cain, having had a fire loss and having money due him by the American Insurance Company, on September 2, 1943, execution was is-

sued and served upon this Company as garnishee levying upon the money due George W. Cain (R. 1). On September 13, 1943, the insurance company filed its answer as garnishee. On September 21, 1943, George W. Cain filed a motion to quash the execution levied in this cause against the funds in the hands of the insurance company, and this was amended on September 24, 1943, by what was called an amendment to the motion to quash execution but which in fact and in law was a plea of discharge by bankruptcy of the debt. On September 28, 1943, Mrs. Lorena Marbry filed her extensive demurrer to this plea of discharge claiming that the liability to Mrs. Marbry was a wilful tort and exempted from discharge (R. 21). On October 4, 1943, the trial court sustained the plea of discharge in bankruptcy of George W. Cain and the cause was appealed to the Supreme Court of Tennessee (R. 26). Assignments of error were filed in the Supreme Court of Tennessee (R. 27, 28, 29). The Supreme Court of Tennessee on January 8, 1944 (R. 31), construed the Bankruptcy Act, Section 17 (11 U. S. C. A.), and applying this federal law to the State judgment which had been rendered September 15, 1941, and which no Court, State or Federal, had any power to revise and held that said judgment, which sued for compensatory and punitive damages and the entire declaration of which was confessed as true, was dischargeable by the bankruptcy proceedings. There was no bill of exceptions to the evidence heard on September 15, 1941, and the question of whether or not this judgment rendered by default on April 18, 1941 (R. 10), and the fixing of the damages by verdict and judgment September 15, 1941 (R. 11), was dischargeable in bankruptcy depends solely and alone upon the *charges made in the declaration*, and the law applicable thereto. There is no disputable question of fact involved.

The declaration was filed August 10, 1940 (R. 3, 4, 5). Tennessee statute relating to declarations, Section 3740 of the code provides:

"The declaration shall state the plaintiff's cause of action. It may contain several *statements* or counts. But where several distinct causes of action against the same party are joined, the court may direct separate trials of the issues."

The section of the Code of Tennessee that has been in force and effect since 1849, Section 8564, is what the pleader is presumed to have followed in this Marbry case, and the statute says:

"All wrongs and injuries to the property and person, in which money only is demanded as damages, may be redressed by an action on the facts of the case."

It will be noted with particular care that for nearly a hundred years the legislative branch of government in Tennessee has provided in the above statute:

"All wrongs and injuries to * * * person * * * may be redressed by *an* action on the facts of the case."

And the Supreme Court of Tennessee in *Cherry v. Hardin*, 4 Heisk., and in *Cotton Oil Company v. Shamblin*, 101 Tenn. 207, 271, construing this statute said:

"The declaration must state facts which constitute the injuries complained of."

Therefore the judgment by default entered on April 18, 1941 (R. 10), and never set aside was final and beyond the power of any Court to modify *after the term* of the Circuit Court of Shelby County Tennessee *adjourned*.

For at least 108 years it has been settled in Tennessee, and also for at least 100 years by the Supreme Court of the United States that:

"It is also settled law that no Court can, in such case, change or modify its judgment of a former term, except for clerical errors. *Elliott v. Cochran*, 1 Cold. 389; *Sibald v. U. S.*, 12 Peters 488" (*Overton v. Biglow* 10 Yerg. 48); *State v. Bank of Commerce*, 96 Tenn. 598.

On September 15, 1941, the following verdict was rendered and placed on record:

"In this cause a writ of inquiry having heretofore been awarded, came the plaintiff herein by attorney and also a jury of good and lawful men towit, Ralph H. Miller, T. G. Kirkpatrick, Willis C. Meek, Edwin C. Carr, W. M. Boughton, R. B. Buckingham, R. A. Dixon, L. W. Meyers, Tom Crouch, Joe H. Schaeffer, E. H. Sullivan who were heretofore duly elected impanelled and sworn well and truly to try this cause and a true verdict render according to the law and the evidence and the jury having heard the evidence of plaintiff and witnesses and received the charge of the Court upon their oaths do say 'We the jury find for the plaintiff and assess as damages the sum of \$3,-500. Ralph H. Miller, Foreman.'

It is therefore considered by the Court that plaintiff have and recover of the defendant George W. Cain the sum of Thirty-five Hundred Dollars, and all costs herein accrued for which let execution issue.

J. P. M. Hamner,
Judge.

Minute Book 92, page 162" (R. 11).

It will be carefully noted that there is not anything in this fixing of damages by the jury and approval by the Court that was not responsive to the declaration. It must be *assumed, implied and presumed* that the trial judge in charging the jury, and the jury in acting upon the facts followed the declaration which had been confessed as true on April 18, 1941, and which was *beyond the power of any*

Court to change or modify, as a term of Court had passed before the jury, and verdict for plaintiff was rendered. The statutory law of Tennessee that appears in Code of 1932, Sec. 10343, says:

"A general verdict, although it may not in terms answer every issue joined, is nevertheless held to embrace every issue, unless exception is taken at the term at which the verdict is rendered."

It will be carefully noted that *no exception was taken* at the term in which verdict was rendered, and by that statutory provision it is provided that the verdict and judgment shall be:

"Held to embrace every issue."

For more than 50 years it has been settled law by the decisions of the Courts of Tennessee as follows:

"We understand it to be well settled that *all the issues* which might have been raised and litigated are *concluded* the same as if they had been directly adjudicated and included in the judgment or decree, *including* *the* *damages*. Thompson, 1 Tenn. Ch. 272; 21 Am. & Eng. L. J. 216. State v. Bank of Commerce, 10 Tenn. 386.

The question involved in this lawsuit is the final judgment upon this declaratory judgment. The compensatory and punitive damages are while there are generalizations and periods in the decree, showing different facts, and as the Code, Section 10343 provides that "All wrongs and injuries to persons" may be redressed by an action on the chart of the case, as was done by the pleader in this case involving wilful injuries to Mrs. Marbry. The words pluralized in the code as to "wrongs" and "injuries" may be redressed on the facts, we must of necessity (as the

Supreme Court of Tennessee did not do), look to and discuss specifically whether or not the *wrongs* and *injuries* stated on the *facts in the declaration*, were acts of mere negligence and also *wilful torts*. In fact suit was brought for not only compensatory but for punitive damages and wilful acts so charged, and those *facts were confessed* as true by the judgment by default which was final. And we further look to the Tennessee law to see whether or not the declaration filed under Section 8564 of the Code covered or raised *an issue of wilful tort*, and we therefore turn to Tennessee law to ascertain whether or not the *facts charged in the declaration* would constitute a *wilful tort within the settled law of Tennessee*. About 60 years ago in *Railroad v. Guinan*, 79 Tenn. 98, the Court said:

"Exemplary damages are allowed when a *wrongful act* is done with a *bad motive*, or so *recklessly* as to *imply a disregard of social obligations*; or where there is *negligence so gross as to amount to positive misconduct*. 1 Suth. on Dam. 723; Sedg. on Dam. 33."

The court further settled the law in this most conclusive and applicable language to the facts as charged in Declaration in this Marbry case, as follows:

"There need not be *positive proof of malice or oppression*. If the transaction, or the *facts shown* in connection therewith, *fairly imply its existence*. *Magge v. Holland*, 3 Dutch 86."

Also in *Tel. & Tel. Co. v. Shaw*, 102 Tenn. 318, and *Amer. Lead Pencil Co. v. Davis*, 108 Tenn. 252, the law in Tennessee on punitive and exemplary damages and the *facts warranting the allowance of same*, has been crystallized in the above language. Tennessee courts reviewed this law as announced in *Day v. Woodworth*, 13 How. 371; *Milwaukee v. Arms*, 91 U. S. 493; *Scott v. Donald*, 165 U. S. 86, and says:

— "The Supreme Court of the United States expresses the same general thought in somewhat different phraseology, not confining itself to any particular words."

The *declaration* sought:

"Compensatory and punitive damages in the sum of ten thousand (\$10,000) dollars and for cause of action says: That on or about the ___ day of June, 1940, she and her husband were walking along on Looney Street in the City of Memphis, Shelby County, Tennessee, and while so using the sidewalks of said street in front of the defendant's home, George W. Cain, the defendant's minor child, started his car which was beside the house and the defendant ran and jumped into the said car and negligently, recklessly, and carelessly operated same so as to back same across the lot and before the plaintiff could get out of the way and protect herself and while she was on the sidewalk, she was run against and into by said car being operated and managed by the said defendant and the plaintiff was knocked to the sidewalk and to the gutter and said automobile ran over her, breaking various and numerous bones in her body and she was bruised and injured both internally and externally and from which injuries she was caused to be carried to the hospital and to remain there for a great length of time and has suffered great physical pain and mental anguish and came near dying and is seriously and permanently injured."

It will be noted that the above declaration charged negligence and carelessness, and recklessness, then it had complete sentences charging facts and punctuations of periods, and there was charged *three* specific charges of recklessness on the part of George W. Cain:

"1. That he recklessly left the key in his car by which his minor children, who were permitted to play in same, might turn on the ignition and start said car;

2. That he recklessly permitted his children to be in said car while the key was in same and while it was subject to be started by merely using the mechanical devices to start same;

3. And then charged a *wilful tort in this language*: 'That when his said minor child did start said mechanical devices in said car so as to start said car, the defendant negligently, carelessly and recklessly, after getting into said car and getting hold of the steering wheel, he managed, operated and directed said car so as to run same over the plaintiff who was using the sidewalk and public thoroughfare and while she was guilty of no negligence whatsoever and causing her to be injured as hereinabove described" (R. 3. 4, 5).

Therefore this was such *wilful, reckless or heedless* conduct on the part of George W. Cain as to amount to:

"Wilful and malicious injuries to the person of another,"

as defined in Section 17 of the Bankrupt Law, and therefore was not dischargeable under the Bankrupt Law (R. 27).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The final judgment that Mrs. Lorena Marbry recovered against George W. Cain in 1941, though scheduled in George W. Cain's bankruptcy proceedings, it was not dischargeable under Section 17 of the Bankrupt Act because it was for wilful tort, and the Tennessee Supreme Court erroneously construed this federal act and erroneously applied this federal act to the judgment owned and possessed by Mrs. Marbry, and the Supreme Court of Tennessee's decision on this federal question involved a fed-

eral question of substance and since a federal right is involved and the declaration which was confessed and on which recovery was awarded, stated facts of a wilful tort committed by George W. Cain in this language:

"The defendant (George W. Cain) negligently, carelessly, and recklessly, after getting into said car, and *getting hold of the steering wheel*, he *managed, operated, and directed* said car *so as to run same over the plaintiff* who was using the sidewalk and public thoroughfare and while she was guilty of no negligence whatsoever and causing her to be injured as hereinabove described" (R.).

Webster's New International dictionary, page 631, Section 4 defines for the last hundred years the word "Direct" to mean:

"To arrange in a direct or straight line, as against a mark or towards a goal; to point; to aim; as to direct an arrow or a piece of ordnance."

Therefore the common acceptation, that has been defined by the lexicographers of the English language for the last hundred years or more the phrase or clause stating facts that George W. Cain:

"After getting into said car and *getting hold of the steering wheel* he *managed, operated, and directed* said car *so as to run same over the plaintiff* who was using the sidewalk and public thoroughfare, and while she was guilty of no negligence whatsoever" (R.).

This is in effect an interpretation of the English language settled for a hundred years that "he pointed or aimed the car, just like he would an arrow or a piece of ordnance," "*so as to run over plaintiff*"; and it was not in the power of the Tennessee court to whittle away or decrease

or diminish the meaning of the charge of facts in the declaration that was confessed as true after some 16 terms of the Court had ended since the judgment was entered and made final. And the erroneous application of the Federal Law, Section 17, of the Bankrupt Act was not correctly or lawfully applied by the Tennessee Courts to this judgment of Mrs. Marbry's, and Tennessee courts deprived Mrs. Marbry of their Federal right that exempted a wilful tort from discharge by Bankruptcy. And these questions were expressly raised by assignment of error before the Supreme Court of Tennessee (R. 27), as well as pointed out in the demurrer raising these federal questions at the threshold of this litigation (R. 21).

JURISDICTION OF THIS COURT.

Jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 937, 28 U. S. C. A. 344 (*Pittman v Home Owners Loan Corp.*, 308 U. S. 21; *Miles v. I. C. R. R.*, 315 U. S. 722), authorizing petitions for writs of certiorari to be prayed for and issued to higher courts of various states where "a title, right, privilege or immunity is set forth or claimed under a statute of United States." In this case, a *privilege*, *right*, and *an immunity* was set forth in the demurrer before the trial court, and in assignments of error before the Supreme Court of Tennessee all of which were erroneously overruled by the Tennessee courts. In the erroneous application of this final judgment to the Federal law; and the construction placed upon the Federal law by the courts of Tennessee was erroneous in applying same to this *federal right*. The Supreme Court of Tennessee is the "highest court of that state" as set forth in Article VI, Section 1, of the Constitution of Tennessee of 1870.

SPECIFICATIONS OF ERRORS ON THE QUESTIONS PRESENTED BY THE RECORD.

In Article I, Section 8, Subsection 5 of the Constitution of the United States Congress was given power to enact:

“Uniform Laws on the subject of Bankruptcies throughout the United States.”

By Article VI of the Constitution it is provided:

“This Constitution, and the Laws of the United States which shall be made, in Pursuance thereof, * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

The judgment rendered in favor of Mrs. Marbry against Cain and which was three years old and after more than 16 terms of the Court had passed, and it not being in the *power of any Court, State or Federal, to revise or modify said judgment*, the bankrupt law passed by Congress Section 17 *expressly exempted or excepted from discharge in bankruptcy “wilful and malicious injuries to person”* and this right existing by expressed federal law, the Tennessee court could not deprive Mrs. Marbry of *this federal right*. The declaration in the State Court charged that George W. Cain:

“After getting into said car and getting hold of the steering wheel he managed, operated and directed said car so as to run same over the plaintiff who was using the sidewalk” (R. 5).

This being confessed as true four years ago and after 16 terms of the Court had passed it was not in the power or authority of Tennessee courts to *revise or modify*

said judgment based upon said pleadings, and which was an *expressed* or an *implied intentional wrong*. Tennessee law as defined in *Draper v. State*, 4 Bax. 246; *Bryan v. State*, 7 Bax. 67; *Wright v. State*, 8 Lea 567, on the law of intent the Court held:

"Every person is intended to presume the usual and natural consequences of his act."

And in *Clark v. State*, 131 Tenn. 372, 144 S. W. 1137, the Court said of a trespass:

"The trespass is wilful when there is heedless disregard for the rights of others."

And in *Union Casualty Co. v. Harold*, 98 Tenn. 593, 596, speaking of intent the Court said:

"A *voluntary act* is an intentional one. One which the actor of his own will, with the *power of choice*, determined to do or perform."

In the leading case of *Allen v. U. S.* (which was 3 times before the Supreme Court of the United States), 164 U. S. 495 announcing the law relative to *intent* said:

"The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it."

Then the Court further said that *intent could be inferred*:

"From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the

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blow was intended prior to the striking, although at a period of time inappreciably distant."

Therefore the intent of George W. Cain to wilfully and maliciously, or at least recklessly, run over Mrs. Marbry is *expressly* or at least *impliedly* stated when we read the confessed charges:

"After he got hold of the steering wheel (the instrumentality by which *the direction of the car is controlled*) he managed, operated, and *directed said car so as to run same over the plaintiff* who was using the sidewalk."

The Supreme Court of Tennessee, we think, committed inexcusable error in this case (176 S. W. 2d 815), when Justice Prewitt said:

"We are unable to see how any inference or conclusion of malicious and willful conduct could result from some person rushing to his automobile that had been started by his small child and *undertaking to stop the automobile which ran into an innocent person*. All of the elements of willful and malicious conduct are lacking."

The language which we have italicized, "And *undertaking to stop the automobile which had run into an innocent person*," does not appear in the record, and the Supreme Court of Tennessee, through Justice Prewitt, has by guess, surmise, suspicion and conjecture and which contradicts, changes, revises and modifies after 3 years or 16 terms of trial court has ended, the language of the pleading confessed as true, done that which the Supreme Court of the United States, and the Supreme Court of Tennessee, in other cases, have expressly held could not be done, because the courts have been uniform in saying:

"No verdict (or judgment) can stand on conjecture." *Chicago, etc., R. R. v. Coogan*, 271 U. S. 472; *Buckeye Cotton Oil Company v. Campagna*, 146 Tenn. 389.

A great federal judge, Ray, in *U. S. v. Green*, 136 Fed. 618, c. d. 190 U. S. 601, expressly held:

"Suspicion, guess, surmise, conjecture, and speculation with some evidence as a basis, do not establish a fact in the eyes of the law."

The Tennessee Supreme Court's error in making this statement, *that is not sustained in the record*, is in the teeth of the facts stated in the record, and is just opposite and just the reverse, because the record says:

"After getting into said car and getting hold of the steering wheel he managed, operated, and directed said car so as to run same over the plaintiff who was using the sidewalk."

The action of the Supreme Court of Tennessee in deciding on this federal right of exemption of Mrs. Marbry's claim under Section 17 of the Bankrupt Act, and a controlling fact by that Court in the opinion, on a factual question, that was not in the record, is, indeed, a novel way "to screen or deprive a citizen of a federal right." If conjecture, guess, surmise or speculation was to be indulged in by the Supreme Court of Tennessee in dealing with this federal right, why did the Court not guess (1) "why Cain did not switch off the ignition," (2) "cut off the power," (3) "apply the foot brakes," or (4) "the emergency brake," and (5) above all "why Cain did not after he got control of the instrumentality that directed and controlled the car, why did he not" direct (point and aim) the car so as to avoid striking and running over Mrs. Marbry who was using the sidewalk. This Court has wisely and fundamentally said, and we ask application:

"This court may not ignore minor violations of constitutional rights." *Patton v. U. S.*, 281 U. S. 276.

The Supreme Court of Tennessee in dealing with Mrs. Marbry's right of exemption under Section 17 of the Bankrupt Law in 176 S. W. 2d 815, further said:

"There is nothing in the declaration indicating any act or acts done by the defendant showing a bad motive, there is nothing to indicate any ill will or malice towards the plaintiff, and there is no act by which she could presume that the thing done was intentional or that the doer should have had a consciousness of the probable result of his unlawful act."

The *first clause* of the above statement of the Supreme Court of Tennessee, is in our opinion, absolutely and expressly contradicted by the *declaration itself*. And that Court had no power to *revise or modify*, in the least, as 16 terms or 3 years had passed since the entry of this judgment by the trial court and from which there was no appeal. To the clause:

"There is nothing to indicate any ill will or malice towards the plaintiff,"

and *this burden placed upon this federal right* by the Supreme Court of Tennessee is absolutely in the *teeth of and contrary to the federal act as construed by the Supreme Court of the United States*, in *McIntyre v. Kavanaugh*, 242 U. S. 138, in which there was urged that *special malice* as indicated was necessary by the Supreme Court of Tennessee and in which it said:

"There is nothing to indicate any ill will or malice."

And this Court in *McIntyre v. Kavanaugh*, 242 U. S. 138, said that *special malice need not be proved*:

"In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained. A wilful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception."

To the *third determinative clause* by the Supreme Court of Tennessee in its opinion,

"There is no act by which she could presume that the thing done was intentional or that the doer should have had a consciousness of the probable result of his unlawful act."

We think that the language of the declaration, confessed as true and charged:

"The defendant * * * recklessly after getting into said car and getting hold of the steering wheel he managed, operated, and directed said car so as to run same over the plaintiff who was using the sidewalk."

And it could have been implied for it is expressly stated that he intended the natural result of his acts when he pointed or aimed the car when he had "control of the steering wheel" by which the car was aimed, pointed and directed, and he "directed it so as to run over the plaintiff," who was using the sidewalk, and certainly under our State and Federal decisions the *wilful intent could be presumed or implied* from this *charge of facts* that were confessed as true. The Supreme Court of Tennessee in this case, 176 S. W. 2d 815, 1st Col., stated:

"It is insisted on behalf of the plaintiff that, judgment by default having been taken against the defend-

ant Cain in the automobile suit, all of the averments and allegations of the declaration must be taken as true. While the declaration contends for compensatory and exemplary damages, the verdict of the jury was general, and it will not be presumed that the jury found the defendant guilty of 'wilful and malicious conduct.' *Fleshman v. Trolinger*, 18 Tenn. App. 208, 74 S. W. 2d 1069."

The *Fleshman* case did not hold as stated by the Supreme Court of Tennessee, and the reason that Faw, J., gave in that case as why *Trolinger* could not be held responsible for a wilful tort and that the wilful tort could not be implied, is:

"Neither the evidence heard by the jury nor the charge of the court to the jury are in the record, and we cannot assume that the jury found that defendant James T. Trolinger was in the automobile at the time it injured Mrs. Garvin, when there is no averment to that effect in the declaration. For this reason, we do not think that the declaration contains an averment that defendant James T. Trolinger willfully (that is, intentionally) drove the car upon and against Mrs. Garvin. *Tippett v. Sylvester*, (N. J. Sup.) 127 Atl. 321." 18 Tenn. App. 218.

And Section 10343 of the Code of Tennessee, that has been in force since 1851, or 93 years provided just to the contrary in this language:

"A general verdict, although it may not in terms answer every issue joined, is nevertheless held to embrace every issue, unless exception is taken at the term at which the verdict is rendered."

Justice Prewitt did not attempt to hold this 93 year old statute void but by using the language that he did he deprived Mrs. Marbry of this federal right by stating a law different from that that has existed in Tennessee for

93 years, and when, by all of the Tennessee and Federal court authorities, he had no power or authority to *revise or modify* the judgment that was entered 16 terms or 3 years before his decision. Why did not the Supreme Court of Tennessee apply to Mrs. Marbry's case the law that had been announced and applied by it in other cases for the last 75 years?

"We understand it to be well settled that *all the issues* which *might* have been raised and litigated are concluded, *the same as if* they had been directly adjudicated, *and included in the judgment or decree.*" *Lindsley v. Thompson*, 1 Tenn. Chy. 272; 21 Am. & Eng. Enc. of L. 216." *State v. Bank of Commerce*, 96 Tenn. 592.

Thus, the Supreme Court of Tennessee failed to apply the statutory law and former decisions, and discriminated against Mrs. Marbry on this Federal right. Since in this judgment Mrs. Marbry possessed a federal right under Section 17 of the Bankrupt Law which exempts her judgment as founded on a *wilful tort* this Court has said:

"No State court can screen denial of or discriminate against a federal right under the guise of enforcing its local law." *Davis v. Westchester*, 263 U. S. 22.

"A State may not discriminate against rights arising under federal law." *McKnnett v. S. L. & S. F. R. Co.*, 292 U. S. 234.

Miles v. I. C. R. Co., 315 U. S. 722.

In the *first reports* of Tennessee, *State v. Council*, 1 Over. 305, 306, the Court speaking of *intent* said:

"When the act is in itself illegal, the law *presumes evil intentions.*"

In a later case of *West v. State*, 9 Hump. 670, the Court speaking of intent said:

"The intent, if necessary to be proven, may and generally *must be inferred from the acts of the party and the circumstances attending the case*; and as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been criminally intended."

And in the case of *Lauterbach v. State*, 132 Tenn. 603, 605, in an opinion by Chief Justice Neil holding Lauterbach guilty of a felonious homicide while operating an automobile and violating the speed law of 20 miles per hour in a reckless disregard of the rights of other cited and followed Connecticut cases and said:

"One who disobeys the statutory rule as to speed is acting in defiance of law, and *must be held to have anticipated the possibility of any injury caused by his recklessness.*"

Then applying the facts confessed as true in the declaration that Cain:

"After he got hold of the steering wheel (the *instrumentality by which said car is aimed, and directed*) he managed, operated and directed said car so as to run same over the plaintiff who was using the sidewalk."

The eyes of the Supreme Court of Tennessee were, we think, covered to such extent by cataracts of human error that the Court discriminated in the application of Tennessee law, against Mrs. Marbry, which law had been applied as settled law in numerous other cases, and deprived Mrs. Marbry of her property and property rights by not correctly applying the facts *charged in the declaration and confessed as true*, and in not correctly applying the Supreme Court of the United States' *construction of this federal statute*, Section 17 of the Bankrupt Act, exempting from discharge wilful torts.

REASONS RELIED ON FOR GRANTING THE WRIT.

It is submitted that this Court should entertain jurisdiction for the reasons:

(a) The question is of importance as evidenced by numerous reported decisions in the Federal and State courts, bearing more or less upon the questions involved.

(b) The case involves a Federal question of substance and the application or construction of Section 17 of the Bankrupt Act, and we think that the Supreme Court of Tennessee has misconstrued this federal statute and has not correctly applied the federal statute as construed and applied by this Court, whose construction has been settled and is final in the case of *McIntyre v. Kavanaugh*, 242 U. S. 138.

(c) Since under Tennessee law both statutory and decisions Mrs. Marbry's judgment was final and 3 years or 16 terms had passed and it was not in the power of Tennessee court to then *revise or modify* said judgment, and since a federal right is involved, "No State Court can screen denial of or discriminate against a federal right under the guise of enforcing its local law (or its idea of local law).". *Davis v. Westchester*, 263 U. S. 22; *McKnott v. S. L. & S. F. R. Co.*, 292 U. S. 236; *Miles v. I. C. R. R. Co.*, 315 U. S. 722.

(d) And as the Supreme Court of Tennessee has directed its opinion to be published in 180 Tenn. _____, 176 S. W. 2d 813, this will not only deprive, if permitted to stand, Mrs. Marbry of her *exemption from discharge in bankruptcy her judgment of \$3,500*, but will in fact and in law be a flag of misconception and misconstruction of the federal law. Federal law is the same in every parallel of latitude and every meridian of longitude throughout the United States.

(e) Article IV, Section 2, of the Constitution, provides:

"The citizens of each State shall be entitled to all privileges and immunities of the citizens in several States."

And the acts on the part of the Tennessee Court deprives Mrs. Marbry of her rights under this federal law to have said judgment *exempted under Section 17.*

(f) In Amend. 14 to the Constitution, it is provided:

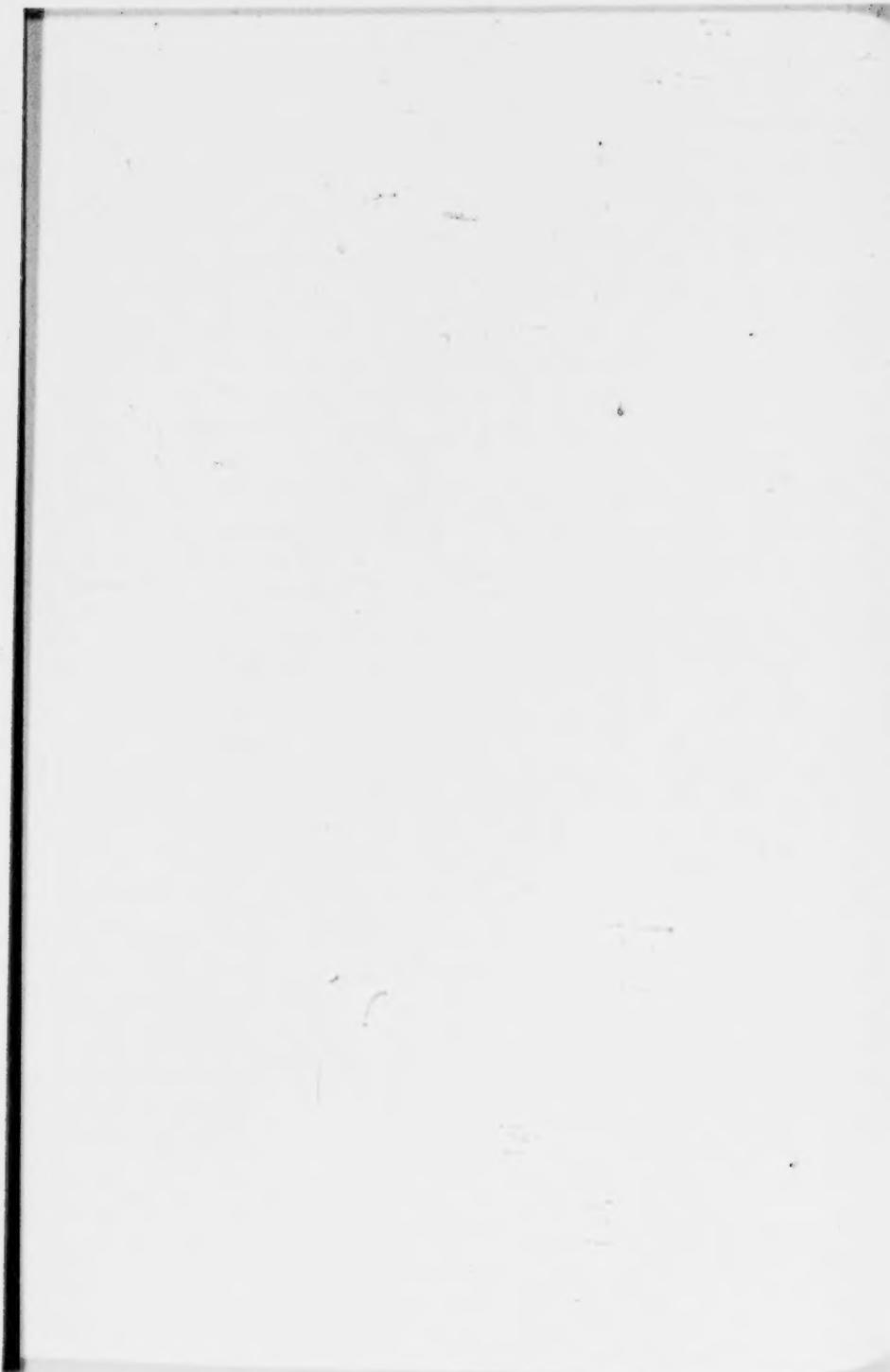
"No State shall make or enforce any law which shall abridge the privileges or immunities of the Citizens of the United States; nor shall any State deprive any person of property without due process of law; nor deny any person within its jurisdiction the equal protection of the Law."

We think and urge that Tennessee Courts have deprived Mrs. Marbry of her property without "due process of law," because it has in effect *revised* and *modified* a judgment which was 3 years old and where 16 terms of the Court had passed and when it was not in the power of said Courts to *modify* or *revise* said judgment. And compensatory and *punitive damages* were sued for, confessed and recovered, and *implies wilful tort.*

Your petitioner presents herewith as part of this petition a certified copy of the transcript of the record of the Supreme Court of Tennessee and presents its brief for consideration with this petition discussing the questions involved. Wherefore your petitioner prays that a writ of certiorari be issued out of and under the Seal of this Court directed to the Supreme Court of Tennessee commanding said Court to certify and send to this Court on a day certain and therein designated a full and complete transcript of record in said Court styled, Mrs. Lorena

Marbry vs. George W. Cain *et al.*, to the end that said case may be reviewed and determined by this Court, and the petitioner may have such relief as this Court may deem proper, lawful and equitable, and that the opinion and judgment of the Tennessee Courts be reversed and this Court hold and decide, as those courts should have held, that the judgment awarded Mrs. Marbry against George W. Cain in 1941, as reflected by the record, be held to be *exempted from discharge in bankruptcy under Section 17 of the Bankrupt Act*, as a wilful tort and which is not only exempted under said law, but by the Act of Congress, Bankrupt Court has no jurisdiction over wilful torts to discharge same.

Mrs. Lorena Marbry,
By WILLIAM G. CAVETT,
Memphis, Tennessee,
Attorney for Mrs. Lorena Marbry.



Supreme Court of the United States

OCTOBER TERM, 1943.

No. _____

MRS. LORENA MARBRY, PETITIONER,

VS.

GEORGE W. CAIN, AND GARNISHEE, AMERICAN
CENTRAL INSURANCE COMPANY,
RESPONDENTS.

BRIEF IN SUPPORT OF PETITION.

This brief, in support of the petition for writ of certiorari, seeks to reverse the judgment of the Supreme Court of Tennessee which held that Mrs. Lorena Marbry's judgment for \$3,500 obtained in 1941 *was not exempted under Section 17 of the Bankrupt Act*, 11 U. S. C. A., Sec. 35, which provides:

"A discharge in bankruptcy shall relieve a bankrupt from all of his provable debts whether liable in full or in part, except such as * * * or liabilities * * * for wilful and malicious injuries to persons * * * of another."

The \$3,500 judgment was for compensatory and *punitive* damages and was *final*, and under neither State nor Federal law, could it be *modified* or *revised* and it carries with it *an adjudication of a wilful tort* and the plaintiff sued for and recovered compensatory and *punitive* damages and this was *final*; and many terms of court had ended, and by both the decisions, and statutory laws of Tennessee, the judgment was crystallized into a *wilful tort not dischargeable in bankruptcy*.

STATEMENT OF CASE.

In interest of brevity Your Honors are respectfully referred to the petition for writ of certiorari herein in which is recited a statement of facts, as well as statement of history of the case. The statute involved in this lawsuit is Sec. 17 of 11 U. S. C. A., Sec. 35, which deprives the bankrupt court of *jurisdiction to discharge* debts where they are "Liabilities for wilful and malicious injuries to the person * * * of another."

SUMMARY OF ARGUMENT.

Federal Question.

The questions involved in this Marbry case fundamentally and necessarily involve the interpretation and application of the Constitution of the United States, an Act of Congress relating to bankruptcy, and the Federal Court's construction of this Act. And the Tennessee courts' decisions are inapplicable. *Tinker v. Colicell*, 193 U. S. 473; *McIntyre v. Kavanaugh*, 242 U. S. 138; *Y. & M. V. R. Co. v. Mullins*, 249 U. S. 531; *Miles v. I. C. R. R. Co.*, 315 U. S. 722, and like cases.

Were Federal Questions Properly Raised?

The *plea of discharge in bankruptcy* was admitted by demurrer to said plea which challenged that *Mrs. Marbry's judgment was for a wilful tort*, and the *bankrupt court had no jurisdiction and no power* under the Act of Congress to *discharge such liability for wilful tort*. The assignments of error before the Supreme Court of Tennessee raised the same questions and the Supreme Court of Tennessee recognized that it was a federal right involved, but erroneously, we think, applied federal law and deprived Mrs. Marbry of this federal right.

Neither the Practice Nor Decisions of Tennessee Courts Can Enlarge, Diminish or Destroy This Federal Right of Mrs. Marbry.

Federal rights growing out of the Act of Congress cannot be enlarged or diminished by State Courts and their decisions, through state practice, or by whatever

means or names the state courts may give to the remedy or distinctions that may be made by state practice:

"Since federal rights are involved no state court can screen denial of or discrimination against a federal right under the guise of enforcing a local law." *Davis v. Westchester*, 263 U. S. 22; *Miles v. I. C. R. R. Co.*, 315 U. S. 722 and like cases.

"States may not discriminate against a right arising under federal law." *McKnott v. S. L. & S. F. R. Co.*, 292 U. S. 234.

The Rights of Mrs. Marbry Are Fixed by the Constitution of the United States and Acts of Congress.

Article I, Section 8, of the Constitution provides Congress has power over

"And uniform laws on the subject of bankruptcy throughout the United States."

Article VI provides:

"This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land."

And the Act of Congress, 11 U. S. C. A. 35, Section 17, takes away from the Bankrupt Court jurisdiction to discharge:

"Liabilities * * * for wilful tort and malicious injuries to the person * * * of another."

The Federal Court's Construction of the Federal Statute Is Supreme and the State Courts Are Bound Thereby.

The Federal Court's construction of the federal statute becomes a part of said statute and binds State courts to follow same and not exercise *their own idea of the meaning and application of the federal law*, creating this

federal right to Mrs. Marbry. The Federal Courts have held this in conversion cases:

Re Arnes, (D. C.) 210 Fed. 395.

Re Keeler, (D. C.) 243 Fed. 720.

Re Baker v. Bryant Fertilizer Co., (C. C. A. 4) 271 Fed. 473.

Re Northrup, (D. C.) 265 Fed. 420.

Re Bryant, (D. C.) 3rd F. 2d 709.

In the *Baker* case, 271 Fed. 473 the Fourth Circuit speaking through Judge Knapp holding as to Baker:

"The record in the case indicates that he deliberately took the company's money and used it in cotton speculation."

Then the court proceeded to hold evidently that he "intended the natural consequences of his act," as we have urged all the way through this case, and therefore Baker was guilty of conversion and the Bankrupt Court had no jurisdiction to discharge such a liability.

In the case of *Tinker v. Colwell*, 193 U. S. 473; *McIntyre v. Kavanaugh*, 242 U. S. 138, it has been expressly held by these federal decisions that a discharge in bankruptcy does not relieve a "malicious wrongdoer from his liability" if the intention of the wrongdoer has been presumed or implied from his acts and the circumstances. The declaration in this case of *Mrs. Marbry v. George W. Cain* sued for compensatory and punitive damages and alleged in her pleadings negligences and also such facts as constitute a wilful tort. The declaration conformed to Section 8564 of the Code of Tennessee and the construction of that by the Supreme Court of Tennessee and its decisions and it was not in the power of that Court to revise or modify in any particular that final judgment of a former term of Court. And to do this would in fact

be discrimination between litigants and not only contrary to the construction of the constitutional right but to the decisions of both the Court of Tennessee and the Federal Government. *Overton v. Biglow*, 10 Yerg. 48; *Elliot v. Cochran*, 1 Cold. 389; *Siabald v. U. S.*, 12 Peters, 488; *State v. Bank of Commerce*, 96 Tenn. 598.

And;

"All the issues which might have been raised and litigated are concluded the same as if they had been directly adjudicated and included in the judgment or decree." 96 Tenn. 692.

And in fixing exemplary and punitive damages in Tennessee for the last 60 years or more the Supreme Court of Tennessee has announced the law as:

"There need not be positive proof of malice or oppression. If the transaction or the facts shown in connection therewith fairly imply its existence."

McGee v. Holland, 3 Dutch 86.

R. R. v. Guinon, 79 Tenn. 98.

And the same has been announced in other cases, and the declaration that *charged the facts in this case* brings it within that law because the facts confessed as true says that the defendant, George W. Cain:

"After getting into said car and getting hold of the steering wheel, he managed, operated and directed said car so as to run same over the plaintiff who was using the sidewalk."

Therefore under *these facts confessed as true* it may be *fairly implied or presumed* that, after he got control of the car by getting hold of the steering wheel, he not only recklessly managed and operated the car but he directed it, *"pointed it,"* and *"aimed it so as to run over*

the plaintiff." If this language was in an indictment for a criminal offense of malicious homicide and there had been a conviction (as there has in this case) and no bill of exception appearing as to what testimony was heard, then the judgment, like rendered in this case, it must be *presumed or implied* that the trial court charged the *confessed declaration as true* and it must be *presumed or implied* that the jury did not go contrary to such charge and such confession of facts as appeared in the record. And *there is nothing contrary in the verdict*, of jury and the judgment rendered or pronounced by the Court. The statutory law of Tennessee appears in Code of 1932, Section 10343, and provides:

"A general verdict, although it may not in terms answer every issue joined, is nevertheless held to embrace every issue, unless exception is taken at the term in which the verdict is rendered."

And the record does not show any exception taken and in addition thereto the Supreme Court of Tennessee for the last 50 years has settled the law and said:

"We understand it to be well settled, that *all issues* which *might* have been raised and litigated, are concluded, the same as if they had been duly adjudicated and included in the judgment or decree. *Lindsley v. Thompson*, 1 Tenn. Chy. 272; 21 Am. & Eng. Enc. of L. 216." *State v. Bank of Commerce*, 96 Tenn. 592.

And it having been the statutory law of Tennessee that,

"*All wrongs and injuries to * * * person may be redressed by an action of the facts of the case.*" Sec. 8564.

The pleader is presumed to have followed this statutory law, and sought and pleaded for compensatory and

exemplary or punitive damages. The facts pleaded were confessed as true, when a judgment by default was entered as provided by Section 8404, Code.

Tennessee construing this statute said:

"If the party is sued upon a valid obligation to which he has no defense, and consequently attempts to interpose none, a judgment by default may be naturally and properly taken against him."

A judgment by default is a judgment *either from the fact that a defendant has no defense to make, or does not appear to make it.*"

Bank v. Divine Grocery Co., 97 Tenn. 602, 37 S. W. 390, 34 L. R. A. 445.

A person cannot take advantage of his own wrong. And no court should assist such person to take advantage of his own wrong, and especially is this true, when a court reads into the record a fact not in the record, and which is read into the record contradicts, diminishes, and destroys the facts *charged in the declaration that was admitted as true* 3 years before or after 16 terms of the trial court had ended.

If rights created by Federal Constitution and law, can be whittled away by a state court thusly, then indeed "federal rights" will soon become, in the picturesque language attributed to Abraham Lincoln,

"as thin as the homeopathic soup made by boiling the shadow of a pigeon that had starved to death."

CONCLUSION.

Mrs. Marbry's right to her judgment was exempted from a discharge in Bankruptcy, under Section 17 as a wilful tort, as this right was created by the womb of Congress (Sec. 17, 11 U. S. C. A. 35), and this lawsuit involving this "federal right," being a federal question, this tribunal is asked to protect that right, grant a writ of certiorari, and reverse the action of the Tennessee courts.

With the fullest measure of confidence in the ends that will be reached by Your Honors, we most respectfully submit client's rights in the foregoing petition and brief.

WILLIAM G. CAVETT,
Memphis, Tennessee,
Attorney for Mrs. Lorena Marbry.

(37)

U.S. Supreme Court, U.S.A.

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CHARLES ELMORE GROPLEY
OLOM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

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NO. 773.
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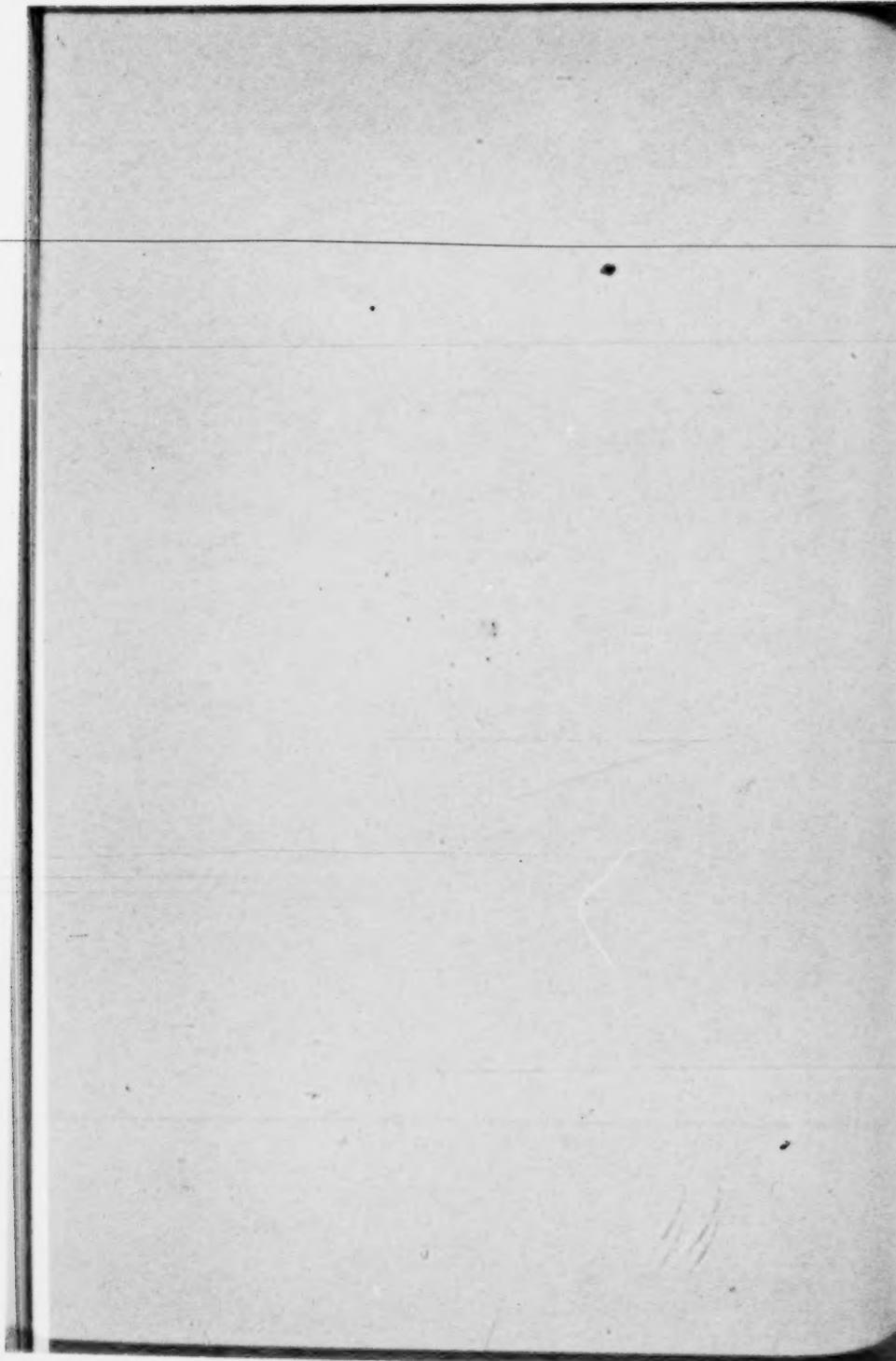
MRS. LORENA MARBRY, PETITIONER,

VS.

GEORGE W. CAIN, ET AL, RESPONDENTS.

ANSWER OF RESPONDENT, GEORGE W. CAIN, TO
PETITION FOR WRIT OF CERTIORARI AND BRIEF.

— — —
LEO E. BEARMAN, and
ADA J. RUSSELL,
MEMPHIS, TENNESSEE,
Attorneys for Respondent,
George W. Cain.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 773.

MRS. LORENA MARBRY, PETITIONER,

VS.

GEORGE W. CAIN, ET AL, RESPONDENTS.

**ANSWER OF RESPONDENT, GEORGE W. CAIN, TO
PETITION FOR WRIT OF CERTIORARI AND BRIEF.**

MAY IT PLEASE THIS HONORABLE COURT:—

Respondent, George W. Cain, for answer to the petition for writ of certiorari and brief filed by petitioner, Mrs. Lorena Marbry, says:

That the petition for writ of certiorari and brief filed by petitioner is lengthy, and many of the cases cited not

in point, and to answer this petition and brief in detail would extend this answer to an undue length.

The pertinent inquiry in this case is whether or not the declaration states such facts as would constitute both willful and malicious injuries to the person of petitioner, by respondent, Cain, so as to bring the judgment obtained by her in the Circuit Court of Shelby County, Tennessee, within the exception of Sec. 17 (2) of the Bankruptcy Act. Title 11 U. S. C. A. Par. 35, which section excludes from the operation of a discharge in bankruptcy, liability "for willful and malicious injuries to the person or property of another."

The Honorable Trial Judge, and the Honorable Supreme Court of Tennessee, were of the opinion that the allegations of the declaration were not such as would bring the judgment within the exception, and that the judgment was barred by respondent's bankruptcy discharge.

It is the insistence of petitioner, Mrs. Lorena Marbry, that judgment by default having been taken against the respondent, Cain, in the automobile suit, all of the facts in the declaration were confessed as true; that a number of terms of the Court had ended, and it was not within the power of any Court, State or Federal to revise, or modify said judgment. Pages 7, 10, 11, and 12 of the printed petition.

We are not trying to revise or modify the judgment, and we have not been able to find any authorities of this or any other Court, holding that a judgment by default is not dischargeable in bankruptcy. In Re; Grout, 88 Vt. 318; 92 Atl. 646, a default judgment was recovered in a

suit styled an action of trespass under a declaration alleging that the defendant assaulted plaintiff; that while she was walking on the street, with due care, he recklessly and negligently ran into her. It was held in that case, that the judgment was barred by defendant's discharge in bankruptcy.

We submit that the fact that respondent, Cain, did not appear and defend the suit, does not amount to a confession that he willfully and maliciously injured plaintiff; he may not have had money to employ counsel, or there may have been some other reason why he did not defend the suit.

It is stated in the case of *Bank v. Divine Grocery Co.* 97 Tenn. 602, 37 S. W. 390, 34 L. R. A., 445:

"A judgment by default is a judgment either from the fact that a defendant has no defense to make or does not appear to make it."

Assuming that respondent, Cain, did by failing to appear and defend the suit, admit the facts charged in the declaration, there is nothing in the declaration which would connote to respondent, Cain, any intention to willfully and maliciously injure the petitioner. That is the view that the Trial Judge and the Tennessee Supreme Court took of the case, and we insist there is no error in their decision.

In an able opinion in this case, by the Learned Mr. Justice Prewitt, of the Tennessee Supreme Court, reported in 176 S. W. 2d. 815; 180 Tenn., it is stated on Page 4 of the typewritten opinion:

"It is insisted on behalf of the plaintiff that,

judgment by default having been taken against the defendant Cain in the automobile suit, all of the averments of the declaration must be taken as true. While the declaration contends for compensatory and exemplary damages, the verdict of the jury was general, and it will not be presumed that the jury found the defendant guilty of 'willful and malicious conduct.' *Fleshman v. Trolinger*, 18 Tenn. App. 208; 74 S. W. 2nd. 1069."

The opinion of the Supreme Court of Tennessee in the instant case, further states: on Page 5:

"We are unable to see how any inference or conclusion of malicious and willful conduct could result from some person rushing to his automobile that had been started by his small child and undertaking to stop the automobile which ran into an innocent person. **All of the elements of willful and malicious conduct are lacking.**

* * * *

There is nothing in the declaration indicating any act or acts done by the defendant showing a bad motive. There is nothing to indicate any ill will or malice towards the plaintiff, and there is no act by which she could presume that the thing done was intentional or that the doer should have had a consciousness of the probable result of his unlawful act."

And on Page 6:

"The words 'wilful and malicious' used in the Bankruptcy Act hereinbefore set out seem to contemplate some **intentional willful act**. These words indicate to us the intentional doing of any act which must and does result in injury to a plaintiff, or that class of torts in which malice and injury are always implied."

There is nothing in the declaration to indicate that

the act was done with a bad motive, or so recklessly as to imply a disregard of social obligations, or that the negligence was so gross as to amount to positive misconduct; there is nothing in the declaration from which willfulness and malice can be implied.

Counsel for petitioner, on Pages 9, 10, 11 and 12 of the printed petition, and a number of times in the petition and brief, has quoted the following language from the declaration:

"After getting into said car and getting hold of the steering wheel, he managed, operated and directed said car so as to run same over the plaintiff who was using the sidewalk."

It is the contention of counsel for petitioner, that that wording of the declaration brings the case within the exception of the Bankruptcy Act, Par. 17, (2) (11 U.S.C. A. Par. 35), excluding from the operation of a discharge in bankruptcy, a judgment for "willful and malicious injuries to the person or property of another."

We submit that every person who drives an automobile, "manages, operates and directs" same, and if they "manage, operate and direct," their automobile negligently and recklessly, so as to strike and injure some one, it does not necessarily follow that they did so "willfully and maliciously."

There is nothing in the above quoted portion of the declaration to indicate that respondent, Cain, purposed or intended to strike petitioner, or that he was conscious in advance that he would run into her. This cannot be presumed. *Re: Cunningham*, 253 Fed. 663. There is no presumption of a willful injury. *Re: Phillips* (DC), 298 Fed. 135.

A reasonable inference to be drawn from the declaration in the instant case, is that the respondent, Cain, left his car parked beside his house, with the keys in same; that his child got in the car, started it and respondent ran out, tried to stop the car, but was unsuccessful, and the car ran across the sidewalk and struck the petitioner. That is the view the Learned Supreme Court took of the case, as shown by the language hereinbefore quoted. Page 5 of the typewritten opinion. 176 S. W. 2d. 815, 180 Tenn.

Counsel for petitioner on Page 18 of the printed petition for certiorari, quotes from the case of *Fleshman v. Trolinger*, 18 Tenn. App. 208; 74 S. W. 2d, 1069, to the effect that the defendant, James T. Trolinger, was not in the automobile at the time of the accident, and that the declaration did not contain an averment that he willfully drove the car upon and against the plaintiff, but he did not quote the paragraph immediately following that quotation, as follows:

"But aside from the proposition just stated, we do not think that there is anything in the declaration which amounts to an averment that the driver of the car, Betty Trolinger, intentionally and maliciously injured Mrs. Garvin. The averments that the car was going at a very rapid and reckless rate of speed, and that it was 'being driven carelessly, wantonly, and in excess of thirty miles per hour, and therefore, in violation of the Statute of the State of Tennessee, regulating the speed of vehicles on any highway or road,' do not connote an intention to injure Mrs. Garvin, or any one else." 18 Tenn. App. P. 218; 74 S. W. 2d. P. 1075, 1076.

In the case of *Fleshman v. Trolinger*, *supra*, there was an averment that "the defendant is guilty of gross, will-

ful, wanton, malicious carelessness and recklessness in driving said car at an unlawful and illegal rate of speed."

There is no charge in the declaration in the instant case, of willful, wanton, malicious carelessness and recklessness, as in the case of *Fleshman v. Trolinger*, *supra*, and in that case, the Supreme Court of Tennessee, held that the judgment was dischargeable in bankruptcy.

Counsel for petitioner, on Page 21 of his printed petition, states that "it was not in the power of the Tennessee Court to revise or modify said judgment, since a Federal right was involved." We are not seeking to revise or modify the judgment, and the Supreme Court of Tennessee certainly had the right to determine the Federal legal question of whether or not the suit on which judgment was based, was one for "willful and malicious injuries to the person" of the petitioner, so as to bring it within the exception of Sec. 17 (2) of the Bankruptcy Act.

In the case of *Fleshman v. Trolinger*, *supra*, it was contended, through an assignment of error, that the Federal Courts alone, had jurisdiction to determine the legal question raised by the motion to quash the execution. In the opinion of the Tennessee Supreme Court in that case, it is stated:

"We hold otherwise. We are not aware of any authority supporting this assignment." 18 Tenn. App. Page 221, 74 S. W. Page 1077.

ANALYSIS OF SOME OF THE CASES CITED BY PETITIONER.

Counsel for petitioner has, in his petition for certiorari and brief, cited and quoted from a number of cases, but none involving the dischargeability of a judgment growing out of the negligent operation of an automobile.

Among the cases referred to by counsel for petitioner, is the case of Allen vs. U. S. 164 U. S. 495 (Page 13 of printed petition.) That is a murder case, and certainly not in point with the instant case; from the very fact of a blow being struck; the very fact that a fatal bullet was fired, it could be inferred as a presumption of fact, that the blow was intended, or the intention to fire the bullet was formed prior to the act, but there would not be that presumption in an automobile accident case.

He also cites the case of Tinker v. Colwell, 193 U. S. 473, 24 S. Ct. 505, 508, 48 L. Ed. 761, on Pages 27 and 29 of the printed petition, which case involves the question of dischargeability in bankruptcy of a judgment for criminal conversation. It is stated in that case:

"It is not necessary in the construction we give the language of the exception in the statute to hold that every willful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual."

We submit that the later cases in the Federal Courts, following the language quoted in Tinker v. Colwell, *supra*,

seem to hold without exception that judgment based upon the reckless, negligent, and unlawful operation of automobiles are dischargeable in bankruptcy. Re: Madigan (DC), 254 Fed. 221; Ex parte Harrison (DC), 272 Fed. 543; Re: Cunningham, (DC), 253 Fed. 663; Re: Roberts (DC), 290 Fed. 257.

Another case cited by counsel for petitioner on Page 7 of his printed petition, is American Lead Pencil Co. v. Davis, 108 Tenn. 252; in that case there was a suit by a ten year old boy for getting one of his arms cut off in some machinery.

Clark v. State, 131 Tenn. 273, 144 S. W. 1137, quoted from on Page 13 of the printed petition, is a case involving trespassing and cutting timber.

The case of McIntyre v. Kavanaugh, 242 U. S. 138 referred to on Pages 16, 21, 27 and 29 of petitioner's printed petition and brief, is a case involving the conversion of some stock, and on Page 29 of the printed petition, counsel for petitioner quotes from the case of Baker v. Bryant Fertilizer Co. (C. C. A. 4), 271 Fed. 473. In that case the record indicated that he, Baker, deliberately took the company's money and used it in cotton speculation.

In the class of cases, cited and relied upon by counsel for petitioner, such as the one for conversion of stock, cutting timber, and other cases mentioned above, malice and injury are always implied, but that is not true of a suit growing out of the negligent operation of an automobile. Re: Phillips, (DC), 298 Fed. 135.

In the case of Re: Phillips, *supra*; after outlining

the class of cases in which malice is implied and injury presumed, it is stated:

"This is not so in every case of a violation of traffic laws, **no matter how reckless** they may be. There is no presumption of a 'willful' injury, because even nominal injury does not necessarily result to the plaintiff creditor or to any individual as a result of the illegal act. The act is willful, the result accidental, and negligent, but not willful."

We do not deem the cases cited by counsel for petitioner in point, for the reason that they do not involve the negligent operation of an automobile, and to discuss each case in detail would serve no good purpose.

CASES RELIED ON BY RESPONDENT, CAIN.

We will discuss briefly some of the cases relied upon by the respondent, Cain, to support his contention that the judgment in the instant case was dischargeable in bankruptcy, as held by the Supreme Court of Tennessee.

It is stated in *Fleshman v. Trolinger*, *supra*, that "as the exceptions tend to impair the bankruptcy's remedy, the Statute being highly remedial, these exceptions should be so construed as to affect that remedy only so far as is necessarily required by its express terms," citing *Collier on Bankruptcy*. (13th. Ed.) P. 619.

It is further stated in the above case that the "authorities all agree that, to come within the exception the injuries must be **both** willful and malicious."

It was held in the *Fleshman v. Trolinger* case, that:

"A judgment for personal injuries caused by the

negligence of the judgment debtor is provable in Bankruptcy." Citing Lewis v. Roberts, 267 U. S. 467, 45 S. Ct. 357; 69 L. Ed. 739, 37 A. L. R. 1440, (Annotated.)

In the case of Ely v. O'Dell, 146 Wash. 667, 264 Pac. 715, there was an appeal from an order of the Superior Court of King County, quashing a writ of garnishment in a proceeding to collect a judgment recovered against defendant in an action for personal injuries received through the negligent operation of an automobile.

In the above case, it is stated:

"The later cases in the Federal Courts, following the language quoted in Tinker v. Colwell, seem to hold without exception that judgments based upon the reckless, negligent, and unlawful operation of automobiles are dischargeable." Citing several Federal cases.

It was held in the case of Ely v. O'Dell, *supra*, that the judgment was discharged by the bankruptcy of the defendant.

We have heretofore quoted from the case of *Re: Phillips*, *supra*, in which it is stated that there is no presumption of a "willful" injury.

In the case of *Re: Cunningham*, 253 Fed. 663, the declaration alleged, that the plaintiff had just completed the turn, when his automobile, without warning was hit from behind and on the left hand side by the auto truck of the defendant, and charged carelessness and negligence in running into plaintiff's automobile without warning. It was held in that case that there was nothing to show that the defendant drove into plaintiff's car intention-

ally, or that he purposed or intended to strike it at all, or was conscious in advance that he would run into it, and it is further stated: "**This cannot be presumed.**"

It was held in the above case that the debt was dischargeable in bankruptcy.

In Re: Wegner, 88 Fed. 2d, 899, the declaration charged that the defendant operated his automobile in a wanton and reckless manner, and with utter disregard for the safety of plaintiff, and ran into and struck plaintiff with great force and violence, and in that case it is stated:

"The most that can be said is that the acts were done 'wantonly and recklessly.' This may be true in any ordinary tort action, in which there is no contention that the acts were done with an **intent** to injure others, or in other words, done **willfully and maliciously.**"

In the case of Re: Wilson, 269 Fed. 845, the jury awarded plaintiff punitive damages, and it was held that the judgment was dischargeable in bankruptcy, since it was not one for **willful and malicious** injury.

In the instant case there was no award of punitive damages, but only a general verdict, and it will not be presumed that the jury found the defendant guilty of "willful and malicious conduct." Page 4 of the type-written opinion of the Supreme Court of Tennessee in this case, citing *Fleshman v. Trolinger, supra*.

In re: Kubiniec, 2 Fed. Sup. 632, an automobile accident case in which it was held that the judgment was dischargeable in bankruptcy, it is stated:

"To constitute a willful injury the act which

produced it must have been intentional, or must have been done under such circumstances as to evince a reckless disregard for the safety of others, **AND A WILLINGNESS TO INFILCT THE INJURY COMPLAINED OF.**"

It is further stated in that case:

"Without the record this Court would be limited to a determination based on whether mere negligence constitutes a willful and malicious injury. *Re: Roberts*, (DC), 290 Fed. 257. In that case it was held that mere negligence did not constitute such an injury and consequently the judgment was dischargeable. The language *In Re Wilson* (DC), 269 Fed. 845, 846, indicates what appears to be the true intent of the Statute. It is that an intentional wrongdoer should not be allowed to escape liability for an act, **but where the injury was the result of negligence relief should be extended.**"

In the case of *In re: Cunningham*, 253 Fed. 663, the declaration charged that the defendant struck plaintiff's automobile from the rear, and charged "carelessness and negligence in running into plaintiff's automobile." It is stated in the opinion in that case:

"There is nothing to show that he drove into the car **intentionally**, or that he purposed or intended to strike it at all, or was conscious in advance that he would run into it. **This cannot be presumed**, and there is nothing in the complaint which would justify the inference that he drove into the car intentionally."

In the case of *In Re, McCarthy*, 8 Fed. Sup. 518, it is said:

"The complaint does not allege, and the record does not show that the damages were sustained by reason of any willful and malicious act of the bankrupt. This Court has held under parallel facts that

a judgment such as was obtained here, was dischargeable. This view is sustained by many authorities," citing Tinker vs. Colwell, *Supra*, Lewis v. Roberts, *supra*, and other Federal cases.

In Re: Vena, 46 Fed. (2), 81, it is said:

"Malice extends to an evil design, a wicked notion against some one.

* * *

"In the instant case, there is no contention that there was any intent to run over the child. There is no evidence that the bankrupt knew that the child, or any one was on the street."

The burden was on petitioner to show that the judgment was one of the classes exempted from the effect of a discharge in bankruptcy, (Fleshman v. Trolinger, *supra*) and we submit that she has not successfully carried this burden.

We could cite other cases from the Federal and State Courts, but do not deem it necessary. We will say, however, that the later cases in the Federal Courts, hold without exception that judgments based upon the reckless, negligent, and unlawful operation of automobiles, are dischargeable in bankruptcy.

C O N C L U S I O N .

Wherefore, respondent, George W. Cain, respectfully insists that the Honorable J. P. M. Hamner, Judge of Division Three of the Circuit Court of Shelby County, Tennessee, and the Learned Supreme Court of the State of Tennessee, were correct in their opinion that the judgment in the instant case, did not result from a cause of action "for willful and malicious" injuries to the person of plaintiff, and that the judgment was dischargeable in bankruptcy; that said decision follows the ruling of this Honorable Court, and of the Federal Courts; is not in conflict with said decisions, and that the petition for writ of certiorari filed by petitioner, Mrs. Lorena Marbry, should be denied.

Respectfully submitted,

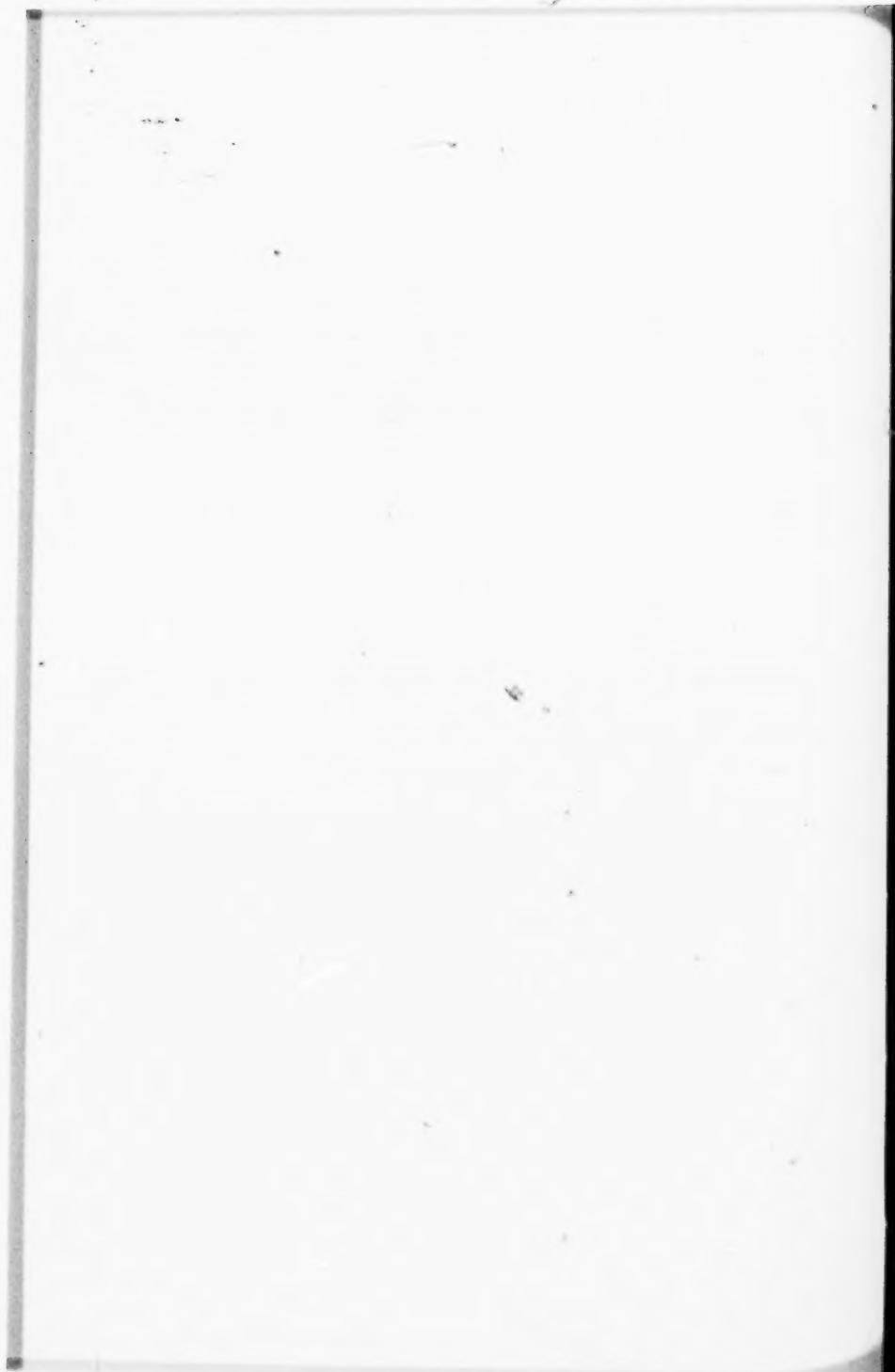
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 773

MRS. LORENA MARBRY,

Petitioner,

vs.

**GEORGE W. CAIN, AND GARNISHEE, AMERICAN
CENTRAL INSURANCE COMPANY,**

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF
TENNESSEE.**

**REPLY BRIEF OF MRS. LORENA MARBRY TO
ANSWER OF GEORGE W. CAIN.**

WILLIAM G. CAVETT,
Attorney for Mrs. Lorena Marbry,
Memphis, Tennessee.



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ANSWER OF GEORGE W. CAIN.**

Since the filing of answer of Cain in this cause admitting on pages 4, 2nd paragraph, page 7, 3rd paragraph, that the "*pertinent inquiry*" of questions for this Court as to dischargeability of judgment depends on the language of the declaration filed in trial court, *August 10, 1940*, and which is quoted on pages 8 and 9 of Petition for Certiorari (R. 5), we ask leave of this Court to file this Reply Brief, sincerely believing it may lessen Your Honor's labors rather than increase same.

The "jugular vein" or "the hub of this case" depends on this language against Cain:

"The defendant (G. W. Cain) negligently, carelessly and recklessly, after getting into said car, and getting hold of the steering wheel, he managed, operated and directed said car so as to run same over the plaintiff who was using the sidewalk, and public thoroughfare, and while she was guilty of no negligence whatsoever" (R. 5).

This language by the decision of an English Court in *Bromage v. Prosser*, 4 Barn. & C. 247, by Mr. Justice Bayley, and *Re Fresche*, 109 Fed. 620, by Judge Kirkpatrick, both of which decisions were quoted and adopted by this Court as fundamentally sound in *Tinker v. Caldwell*, 193 U. S. 473, decided 40 years ago, opinion by Mr. Justice Peckham, forever settled the law that:

"A voluntary act is an intentional one."

"Intentionally" means "wilfully".

2 Bouvers L. Diet. 656. Northern Rr. Co. v. Carpenter, 13 How. Pr. 22.

In the *Tinker* case, *supra*, the Court pointed out in this clear language:

"The act of Freeche which caused the injury was wilful, because it was voluntary. The act was unlawful, wrongful, and tortious, and being wilfully done it was, in law, malicious." 193 U. S. 486.

The fundamental error of Tennessee courts, and also of opposing counsel, is not fundamentally applying "malice in law" as defined, but in applying "malice in common acceptance". This Court has said:

"Malice, in common acceptance, means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." 193 U. S. 486.

Applying these fundamental rules of law to the facts in this case, did not G. W. Cain act voluntary and wilfully when he after:

1. "getting into said car"
2. "getting hold of the steering wheel"
3. "he managed" (the car so as to run over plaintiff who was using the sidewalk)
4. "operated" (said car so as to run over plaintiff who was using the sidewalk)
5. "directed" (said car so as to run over plaintiff who was using the sidewalk)

These *five* acts were *voluntary* on the part of George W. Cain and therefore *wilful*, and intentional, and these acts were unlawful, wrongful, and tortious, and being wilfully done, they were, in law, malicious.

In the *Tinker* case this Court said:

"If he intentionally did drive over him, it would certainly be malicious." 193 U. S. 489.

This important fact was omitted by opposing counsel in answer, page 10 in 4th paragraph. Then applying this in this *Marbry* case:

If (George W. Cain) intentionally did drive over her (Mrs. Marbry) it would certainly be malicious.

Then we have this confessed, adjudicated charge as true:

The defendant (George W. Cain) after getting into said car, and getting hold of the steering wheel, he managed, operated, and directed said car so as to run over the plaintiff who was using the sidewalk, and public thoroughfare, and while she was guilty of no negligence whatsoever, and causing her to be injured.

If George W. Cain had thrown a brickbat out his window onto the sidewalk and brained Mrs. Marbry, would this have been a voluntary, intentional, wilful and malicious act?

Applying the fundamental rules of law announced in the *Tinker* case in *McIntyre v. Kavanaugh*, 242 U. S. 138, which was a suit for conversion of stock hypothecated, the Court said of this sale that it was:

“without notice to plaintiff and without his authority, knowledge or consent or demand of any kind upon him, sold and disposed of the identical stocks * * * and placed the avails thereof in the bank account of said firm.”

This was of course applying those fundamental rules that the acts of the partners was *voluntary* and therefore *intentional* and *wilful*, and then when the *proceeds* of the sale were *deposited in the firm's bank account*, this was unlawful, wrongful and tortious, and being wilfully done, it was, in law, malicious.

Tennessee courts before this *Marbry* case held:

“A voluntary act is an intentional one.”

Union Casualty Co. v. Harrold, 98 Tenn. 593, 596;
Mutual Ins. Co. v. Distretti, 159 Tenn. 138.

Seventy years ago the Supreme Court said:

“A sane man may be punished by vindictive damages for his acts.”

Ward v. Conatser, 63 Tenn. 66.

In *Tel. & Tel. Co. v. Shaw*, 102 Tenn. 313, 319, the Court pointed out that in the *Poston* case, 10 Pick. 696, sustaining vindictive damages, held,

“There was only gross negligence in not getting permission from the true owner.”

Mr. Justice McFarland who delivered this opinion has been said by the Bar of Tennessee to have been “Tennes-

see's most just judge." The fact that the telegraph company did not get permission to cut the limbs from the trees from the true owner was held to be a voluntary act and therefore a wilful act and would not have been dischargeable as defined in the *Tinker* and *McIntyre* cases in which the Court said:

"A wilful disregard of what one knows to be his duty, an act which is against good morals and wilful in and of itself, and which necessarily causes injury, and is done intentionally, may be said to be done wilfully and maliciously so as to come within the exception." 193 U. S. 473; 242 U. S. 138.

And Chief Justice Magruder defined the word "reckless" as follows:

"The word 'reckless' implies heedlessness and indifference."

Lakeshore and M. S. Rr. Co. v. Bodemer, 139 Ill. 596;

29 N. E. 697, 32 Am. St. Rep. 218.

Lauterback was found guilty of felonious homicide while operating an automobile "recklessly" in violation of 30 miles per hour statute in Tennessee, 132 Tenn. 63, 65.

Therefore by the law that has been announced in English and Federal courts and also in Tennessee courts, Cain's acts were voluntary, and therefore intentional and wilful and being wrongful, unlawful and tortious, and being done intentionally his acts resulted in injury and are not dischargeable in bankruptcy under Section 17.

The statistics made up by the insurance companies of America show that more persons are injured and killed yearly by automobiles than are injured or killed in our armed forces scattered all over the world and aggregating

some eight million persons in two and one half years of war.
We can conceive of no superior right or "special dispensation" to those who commit voluntary, intentional and wilful injuries by automobiles.

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